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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 13

THOMAS W. BANKS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

AND

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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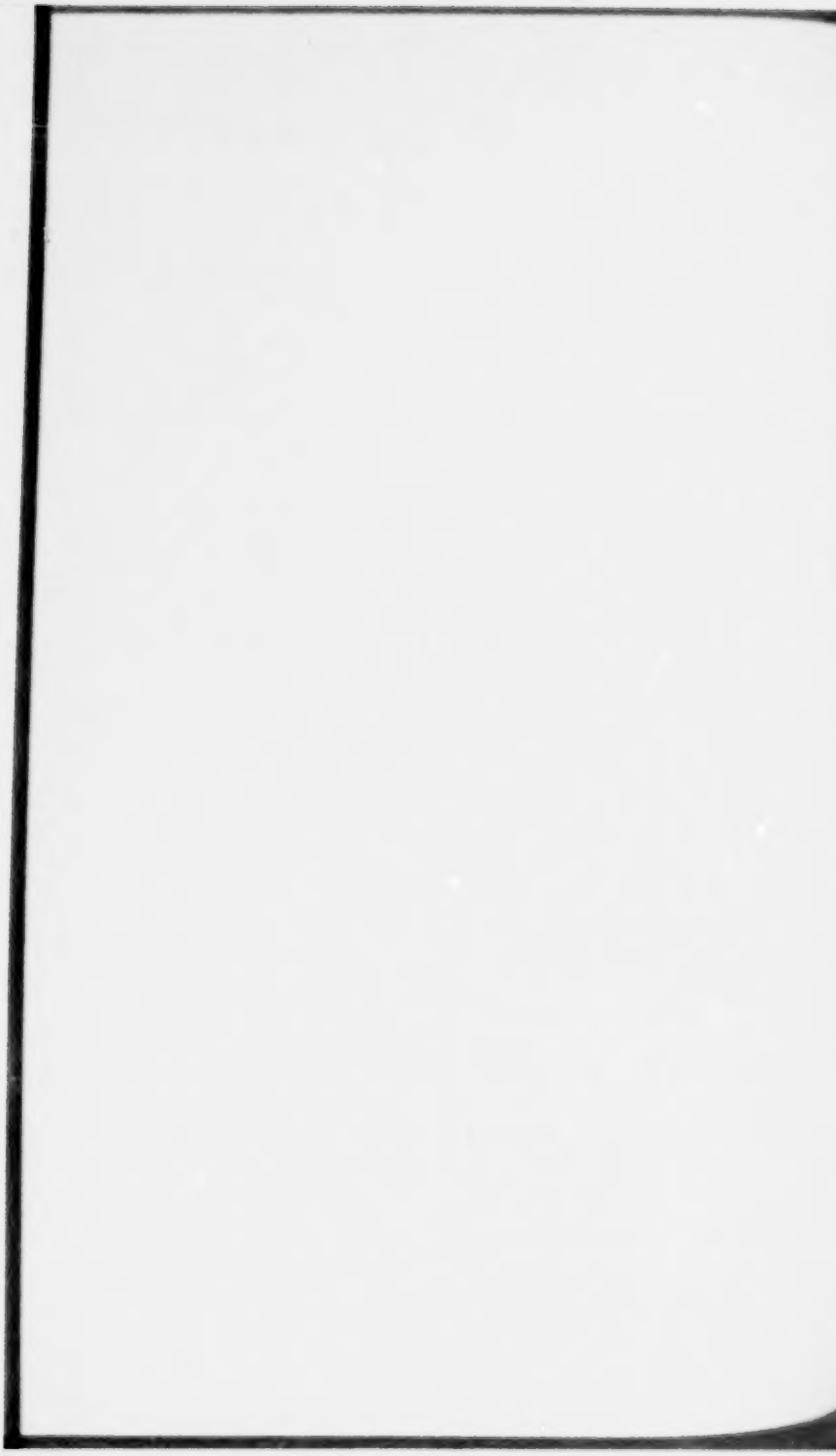

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The petitioner, Thomas W. Banks, by his attorneys, Alvin O. West and John W. Graff, moves the Court for leave to file the attached Supplement to Petition for Writ of Certiorari, and in support of such motion states:

Since the filing of the petition for the writ in this cause, a tax evasion prosecution in which the Government employed the net worth method, petitions in other tax evasion cases where the net worth method was used have been filed with the Court and have been granted; those cases have been argued and only recently the Court has rendered its decisions.* In its opinion in one of those cases, *Holland* v. *United States,* this Court said (slip opinion, p. 2):

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* *Holland* v. *United States,* No. 37; *Friedberg* v. *United States,* No. 18; *United States* v. *Calderon,* No. 25; *Smith* v. *United States,* No. 52.

> • • • At our last Term a number of cases arising from the Courts of Appeals brought to our attention the serious doubts of those courts regarding the implications of the net worth method. Accordingly, we granted certiorari in these four cases and have held others to await their decision.

From all the circumstances it is apparent that the present case is one of the cases which the Court has been holding awaiting the decision in the four cases referred to above. Thus petitioner is in the unusual situation of having the decision in his case made on the basis of principles enunciated in other cases which arose in this Court and were decided long after his petition was filed.

Since the decisions in the four cases above-mentioned are to have such a significant bearing on the decision in the instant case, petitioner respectfully suggests to the Court that in the interest of the proper and complete presentation of his case, and as an aid to the Court in the analysis of this case to determine the impact on it of these decisions rendered since the petition herein was filed, petitioner should be granted leave to file the attached supplement to his petition for writ of certiorari.

Respectfully submitted,

Alvin O. West,
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ORDERS PERTAINING TO PETITION

Under date of October 19, 1953, an order was entered in this cause denying the petition for writ of certiorari. 346 U.S. 857. Under date of June 7, 1954 the order denying certiorari was vacated and the case was restored to the docket. 347 U.S. 1007.

At the same time this case was restored to the docket this Court granted certiorari in four cases which, like the instant case, are tax evasion cases which were prosecuted on the net worth theory.*

Since those four cases have now been decided the purpose of this supplement is to point out the respects in which

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* *Holland* v. *United States*, No. 37; *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Smith* v. *United States*, No. 52.

the decisions rendered in those cases bear on the issues raised in the present case.

I. Essential Facts in the Government's Case Against Petitioner Were Established Solely by Uncorroborated Admissions Made Subsequent to the Alleged Crime

A substantial part of the Government's evidence consisted of answers submitted to a Government investigator by petitioner's attorney in response to certain questions and testimony as to agreements with petitioner's agents as to petitioner's living expenses (Pet. 7-8). The living expenses for the three prosecution years totaled $39,000 according to one agreement and $34,000 according to the other, as compared with a total of alleged unreported income for the same years of only $54,062.76 (R. 349, 353; Ex. 224). Petitioner objected to this evidence on the ground that these admissions were not binding on him (R. 205, 347-348, 352).

The second question in the petition (Pet. 3, 18-20) challenges the ruling of the court below to the effect that a power of attorney for representation before the Treasury Department authorizes the agent to make admissions which are binding on the taxpayer in a criminal prosecution. But if it should be decided that these admissions were properly received in evidence, this Court should give consideration to the fact that these admissions alone were taken as establishing the facts they purport to set forth, as they are not corroborated (R. 354, 449, 450, 451, 475, 476, 477, 478, 479, 497, 505, 517, 518, 544).

Since these admissions were made long after the alleged offense they clearly required corroboration, under the decisions of this Court in *Smith* v. *United States*, No. 52, October Term 1954, and *Opper* v. *United States*, No. 49, October Term 1954. We submit that this Court, in passing on the petition herein, should apply the rule announced in those cases requiring corroboration of admissions made after the fact.

II. The Admission on Which the Government Based Its Starting Point, Although Made Prior to the Alleged Crime, Was Made Under Such Circumstances as Should Bring It Within the Rule of the Smith and Calderon Cases, Requiring Corroboration, Rather Than the Warszower Case Under Which Corroboration Is Not Required

Although the prosecution years were 1945, 1946, and 1947, the Government took as a starting point an affidavit sworn to by petitioner in 1937 (Br. in Opp. 5). This affidavit (Ex. 33) was submitted by petitioner to the Alcohol Tax Unit in support of an offer in compromise of an assessment of federal alcohol taxes against petitioner and others (R. 192, 337-339, 340).

With respect to the question of the necessity for corroboration, this affidavit presents a situation distinguishable from that dealt with by this Court in *Warszower* v. *United States*, 312 U.S. 342. In the *Warszower* case the admissions on which the Government relied all involved answers by the defendant to routine inquiries as to his country of birth and citizenship status, made on occasions prior to the alleged offense when defendant entered this country, when he registered for the draft, and when he applied for a reentry permit. In none of these situations was the defendant in an adversary position to the Government, so that there was no reason to assume that there was any motive, such as self-interest, which would lead him to give information which was untrue.

On the other hand, the record here discloses that petitioner and others had been subjected to an alcohol tax assessment of $33,589.92, so that his interests were unquestionably antagonistic to the Government (R. 339, 340). With respect to the affidavit submitted by petitioner in support of the offer to compromise this assessment, the situation is like that described by this Court in the *Holland* opinion—"when a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth."

Because the admission here was made at a time when the interests of the Government and the petitioner were antagonistic, we contend that it falls within the rationale of the *Smith* and *Calderon* cases, and that unless it is corroborated it should not be allowed to sustain a conviction in another situation where the interests of the Government and the petitioner are likewise antagonistic.

This matter is of particular importance not only because the Government made no effort to corroborate the statements contained in the affidavit—here the Government agent in fact deliberately ignored evidence which he had (for example, subsequent income tax returns) clearly indicating that the information in the affidavit concerning petitioner's financial position was incomplete (R. 540-542, 546-547). We submit that to require corroboration of such an admission is consistent with the reasoning of this Court in the *Smith* and *Calderon* decisions and is not in conflict with a proper application of the *Warszower* decision.

III. What This Court Has Described as the Dangerous Practice of Receiving in Evidence, Without Guarding Instructions, Charts Summarizing the Analysis and Computation of the Government's Expert Witness Was Followed in This Case

In the *Holland* case this Court undertook "to point out the dangers that must be consciously kept in mind in order to assure adequate appraisal of the specific facts in individual cases," and in the course of its remarks said (slip opinion, p. 5):

> * * * There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

We submit that the third question in the petition (Pet. 3, 20-21) deals with precisely the same situation referred to by this Court in the language quoted above.

IV. The Instructions in This Case Failed to Meet the Standard Prescribed by This Court in the Holland Opinion, as They Did Not Include a Summary of the Nature of the Net Worth Method, the Assumptions on Which It Rests, and the Inferences Available Both For and Against the Accused, and a Requested Instruction of This Type Was Refused

This Court, in concluding its statement in the *Holland* case of the dangers which trial courts should guard against in tax evasion prosecutions on the net worth theory, said (slip opinion, pp. 6-7):

> * * * Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. * * *

In this case petitioner submitted a requested instruction to the trial court covering several essential features of the proof of a net worth case, and the denial of that instruction, affirmed by the Court of Appeals, is urged in the petition as being a question of sufficient importance to warrant its review by this Court (Pet. 3-4, 10-11, 21-22). Attempting to justify the refusal of the instruction requested by petitioner, the Government relies on an instruction directing the jury to determine (Br. in Opp. 19-20; R. 618):

> whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

In addition to the fact that this instruction does not comprehend any of the features of petitioner's requested

instruction which was refused, the instruction above-quoted has the added vice of emphasizing the charts which were being placed in their hands to take to the jury room, setting forth the computations of the Government's expert, and making their decision in the case turn on their finding as to the accuracy of his calculations. We submit that, instead of showing a compliance with the caution given by this Court as to the substance of the charge, the instruction as given further demonstrates the importance of the third question in the petition (Pet. 3, 20-21).

CONCLUSION

For the foregoing additional reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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